

DECISION



27126
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-210275.2

DATE: December 28, 1983

MATTER OF: United States Contracting
Corporation--Reconsideration

DIGEST:

1. Prior decision is affirmed on reconsideration where the protester has not shown any error of law or fact which would warrant reversal of the decision.
2. A firm's recourse to contracting agency documents that allegedly support its position, but which it has not been able to secure from that agency, is to pursue the disclosure remedies provided in the Freedom of Information Act. Moreover, GAO has no authority under that act to determine what information other agencies must disclose.

United States Contracting Corporation (USCC) requests reconsideration of our decision in United States Contracting Corporation, B-210275, August 22, 1983, 83-2 CPD 222. In that decision, we denied USCC's protest that it was precluded from bidding by alleged defects in invitation for bids (IFB) No. N62474-82-B-3235, issued by the Terminal Island Naval Complex, Long Beach, California. The IFB was for the maintenance and replacement of approximately 39,000 heating and air conditioning filters. We affirm our decision.

USCC contends that we improperly characterized the contract to be awarded under the IFB as a requirements contract and argues that our decision is incorrect to the extent that it relies on that characterization. USCC bases its contention on the fact that the IFB solicited bids on a lump sum price basis for a specific number of filters and frequency of service, and did not provide for deliveries to be scheduled by the placement of orders with the contractor.

Defense Acquisition Regulation (DAR) § 3-409.2(a) (1976 ed.) describes a requirements contract as providing for "filling all actual purchase requirements of specific supplies or services . . . during a specified contract period with deliveries to be scheduled by the timely placement of orders upon

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the contractor. . . ." The regulation notes that "an estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible."

USCC is correct in stating that the contract contemplated by the IFB does not strictly meet the DAR definition of a requirements contract since it does not provide for placement of orders upon the contractor and payment on that basis. The emphasis in our decision, however, was not on contract type but on the fact that the IFB contained the Navy's standard requirements clause, which cautions bidders that the quantities of supplies or services specified are only estimated. Our point was that even if the specified quantities were not completely accurate, bidders were on notice of this fact and could protect themselves by allowing for that risk in computing their bids. See Palmetto Enterprises, 57 Comp. Gen 271 (1978), 78-1 CPD 116. We consider this principle applicable even where the type of contract utilized does not meet the strict definition of a requirements contract. Id. Consequently, we find no merit to USCC's position.

USCC also argues that it has been unable to prove the IFB defective because the Navy has not supplied it with all of the correspondence between the Naval Complex and the Navy Office of General Counsel. We fail to see how the absence of this information prevented USCC from making its case since its protest is based on the premise that as the incumbent contractor, it has superior knowledge of the actual correct specifications. In addition, if USCC desires access to the specified documents, it may request them from the Navy under the Freedom of Information Act (FOIA). Our Office, however, has no authority under FOIA to determine what information government agencies must disclose. Philcon Corp., B-206905; B-208223; B-208034, March 29, 1983, 83-1 CPD 319.

The remainder of USCC's request for reconsideration essentially consists of facts and details which USCC believes support its original protest. Our Bid Protest Procedures require that requests for reconsideration specify any errors of law or information not previously considered which would warrant reversal of our prior decision. 4 C.F.R. § 21.9(a) (1983). Information not previously considered refers to that which may have been overlooked by our Office or to which the

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protester did not have access during the pendency of the original protest. Space Age Engineering, Inc.--Reconsideration, B-205594.3, September 24, 1982, 82-2 CPD 269.

All of the information relied on by USCC was either considered in our prior decision or was available to USCC at the time of our initial consideration of the protest. In the former category is the fact that those bidders who allegedly did not possess prior knowledge of the actual job site conditions bid higher than those bidders--USCC identifies two--who allegedly did have such knowledge.¹ In the latter category are a number of examples of alleged specification deficiencies discovered by USCC during the time it held the contract for the work. There is, therefore, nothing in USCC's assertions that was not presented and considered or which could not have been presented in connection with its initial protest. Consequently, nothing in USCC's request for reconsideration warrants reversal of our initial decision.

Our prior decision is affirmed.

for Larry R. Dan Cline
Comptroller General
of the United States

¹ This in fact was part of the basis for our conclusion that USCC was not prejudiced by the alleged solicitation deficiencies in any event.